SUPREME COURT OF APPEALS OF VIRGINIA.

SOUTHERN RY. CO. v. PATTERSON.

Feb. 2, 1906.
[52 S. E. 694.]

1. Railroads—Operation—Fires—Negligence—Questions for Jury.—In an action against a railroad for the destruction of property situated along the right of way by fire communicated from an engine, evidence authorizing an inference that the fire was caused by a red-hot clinker of unusually large size being thrown from the tender by the fireman of the engine, or suffered to fall from the footboard and to roll down the right of way, was sufficient, as against a demurrer to the evidence and in the absence of any explanation or denial by the fireman, to establish defendant's negligence.

2. Same—Contributory Negligence—Burden of Proof.—In an action against a railroad for destruction of property by fire communicated from a locomotive, the burden of proving contributory negligence rests upon defendant, unless such negligence appears by plaintiff's own evidence or may be fairly inferred from the circumstances.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1715.]

3. Same — Location of Property Destroyed — Contributory Negligence—Questions for Jury.—It is not negligence per se for one to build a warehouse used for storing barrels of kerosene oil within a few inches of a railroad's right of way, and the construction of the warehouse in such position does not as a matter of law preclude a recovery for the destruction of the warehouse by a fire resulting, not from accident, but from the negligence of the operatives of a passing train.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1679, 1745.]

Error to Circuit Court, Pittsylvania County.

Action by T. J. Patterson against the Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Harrison & Leigh, for plaintiff in error.
George T. Rison, for defendant in error.

WHITTLE, J. The object of this action is to recover damages from the plaintiff in error, the defendant in the court below, for the destruction by fire of a wooden warehouse and adjacent buildings, and other property of the plaintiff; the origin of the fire being ascribed to the negligence of the defendant.

The company demurred to the evidence, and the case is before us upon a writ of error to the judgment of the trial court over-

ruling the demurrer and awarding to the plaintiff the damages conditionally assessed by the jury.

The warehouse in question was located upon the land of the plaintiff in the vicinity of one of the defendant's stations, and within a few inches of the right of way, and had been used for years as a depository for storing kerosene oil in barrels. The source of the fire was a red-hot clinker of unusually large size, which the jury would have been justly warranted by the evidence in inferring was withdrawn by the fireman from the fire box of the engine, and either negligently thrown off the tender by him or suffered to fall from the footboard and roll down the embankment to a point from which it communicated fire to the building.

We therefore quite agree with the conclusion reached by the learned judge of the circuit court that from the standpoint of a demurrer to the evidence, and in the absence of any explanation or denial by the fireman, the initial negligence of the defendant was clearly established.

But the company denies liability upon the further ground that, even if it be conceded that the fire was primarily caused by the negligence of its employee, the plaintiff was, nevertheless, guilty of such contributory negligence in locating his warehouse immediately along the company's right of way as to bar a recovery.

The burden of proving contributory negligence rests upon the defendant, unless it be disclosed by the plaintiff's own evidence, or may be fairly inferred from all the circumstances, and (inasmuch as this case does not come within the exception, and there is no evidence to sustain the allegation) the question having been withdrawn from the consideration of the jury by the demurrer to the evidence, it must be resolved in favor of the plaintiff, unless this court shall declare as matter of law that the bare location of the warehouse, in such proximity to the right of way, or the manner of its use, constituted negligence per se.

Such contention would seem to be opposed both by experience and observation, for the warehouse had for years escaped the ordinary dangers incident to passing trains, and it is matter of common knowledge that similar structures, devoted to like purposes, are erected along the route of railroads throughout the country.

It is true that the owner of land who elects to establish buildings, or place combustible material, near the track of a railroad, assumes the increased risk from accidental fires, and cannot thereby abridge the right of the company in the lawful use of its property. Pierce on Railroads, 436. But that principle is not to be so interpreted or applied as to exonerate a railroad company from liability for an injury proximately caused by its own negligence.

The case of Chicago & N. W. R. Co. *v.* Simonson (Ill.) 5 Am. Rep. 155, was cited to maintain the rule that the owner who suffers combustible material to accumulate upon his land contiguous to the railroad is guilty of contributory negligence, and cannot recover damages for a fire negligently ignited on the right of way.

That decision is opposed to the great weight of authority on the subject in this country, and contravenes the settled doctrine in this jurisdiction. Railway Co. *v.* Medley, 75 Va. 507, 40 Am. Rep. 738; Kimball *v.* Borden, 97 Va. 477, 34 S. E. 45; White *v.* Railway Co., 99 Va. 357, 38 S. E. 180.

In a note to the principal case numerous authorities are cited to the contrary, and with respect to it the reporter observes: "The latest decision on the subject is that in Kellogg *v.* Chicago & N. W. Ry. Co., 26 Wis. 223, 7 Am. Rep. 69, wherein, after a most elaborate and powerful argument, the doctrine of contributory negligence by the adjacent landowner was repudiated."

The ultimate limit to which the doctrine seems to have been carried, in connection with the erection and use of buildings, is that the question of the contributory negligence of the owner ought to be submitted to the jury, upon the facts and circumstances of the particular case, a course which was not followed in this instance. 2 Thompson's Com. on Neg. § 2326; Murphy v. Chicago, etc., R. Co., 45 Wis. 222, 30 Am. Rep. 721; Kesee *v.* Railroad Co., 30 Iowa, 78, 6 Am. Rep. 643.

Upon the whole case we are of opinion that the judgment is without error, and it must be affirmed.

Note.

Fires—Erection of Buildings Near Railroad Right of Way.—The rule is well settled that the plaintiff is not guilty of contributory negligence in erecting buildings near the track of a railroad, so as to bar his recovery for injury proximately caused by the negligence of the railroad company, though he knew the building was more exposed to fire than if at a greater distance. Cincinnati, etc., R. Co. *v.* Barker, 94 Ky. 71, 21 S. W. 347; Perley *v.* Eastern R. Co., 98 Mass. 414, 96 Am. Dec. 645; Briant *v.* Detroit, etc., R. Co., 104 Mich. 307, 62 N. W. 365; Alpern *v.* Churchill, 53 Mich. 607; King *v.* Morris, etc., R. Co., 18 N. J. Eq. 397; Cook *v.* Champlain Transp. Co., 1 Den. (N. Y.) 91; Burke *v.* Louisville, etc., R. Co., 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; Ward *v.* Milwaukee, etc., R. Co., 29 Wis. 144; Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co., 27 Fla. 1, 9 S. W. 661; Cook *v.* Champlain Transportation Co., 1 Deuio (N. Y.) 91; Indianapolis, etc., R. Co. *v.* Paramore, 31 Ind. 143.

Florida.—A person having property adjacent to a railroad is not bound to keep his property in such a condition as to guard against the negligence of the railroad company, but every person has the right to enjoy his property in the ordinary manner; and, while one is charged with the duty of saving his property when he can do so, he is under no obligation to stand guard over it, continually watching it, to protect it from the negligence of a railroad company. The fact

that a person's property is exposed to the reach of sparks of a locomotive engine is no defense to an action for an injury occasioned by the railroad company's negligence in setting out fire. A person has the right to construct buildings on any part of his property, and to enjoy the same, without rendering himself liable to the negligence of a railroad company. Jacksonville, etc., R. Co. *v.* Peninsular Land, etc., Co. (Fla.), 9 South. Rep. 662.

Michigan.—In an action on the case for negligent injury by fire, alleged to have been communicated from defendants' premises, it was held, that it was not contributory negligence that the plaintiff erected his buildings within a hundred yards or so of defendants' mill, although such buildings were erected after the defendants had put up a dangerous burner, without a proper spark arrester, and although the plaintiffs did not cover their buildings with metallic roofs. The court said: "It is not suggested that the buildings were exceptionally combustible, or that the roofs were of different material to that made use of by the plaintiff's neighbors; but it is said that, in view of the danger to which she was exposed from the burner, she should have incurred the extra expense of a metallic roof for protection, and was negligent in not doing so. This strikes us as a most extraordinary proposition." Alpern *v.* Churchill, 33 Mich. 607, 19 N. W. 549.

Texas.—In an action against a railroad company to recover damages for burning a barn by carelessly allowing sparks to escape from its locomotive, it was held that there was no error in refusing to charge that "it is the duty of a person owning property so close to a railroad that it is liable to injury by sparks from passing engines to use a high degree of care to protect the property so situated." Appellee's barn was about 130 feet from the railroad track. The court charged, correctly, we think, that the measure of his duty was the case of a person of ordinary prudence, which, however, in fact might, in a given case, be a high degree of care. Gulf, etc., R. Co. *v.* Jagoe (Tex.), 32 S. W. 719.

SWIFT & CO. *v.* CITY OF NEWPORT NEWS.

March 1, 1906.

[52 S. E. 821.]

1. Eminent Domain—Compensation—Alteration of Grade of Highway.—At common law municipal corporations were not liable to one whose land was not taken for consequential damages arising from the change of grade of a street, although improvements had been made on his lot in conformity to a former grade.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 269, 270.]

2. Common Law—Continuance in Force.—The common law remains in force in this state, except when changed by statute or the Constitution.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Common Law, §§ 9-12.]

3. Statutes—Construction—Prospective Operation.—The Constitution and statutes operate prospectively only, unless the words therein